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No. 98-1818

In the Supreme Court of the United States

WISCONSIN DEPARTMENT OF TRANSPORTATION, DIVISION OF MOTOR VEHICLES, ET AL., PETITIONERS

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994, 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), violates the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9a-24a) is reported at 163 F.3d 1000. The opinion of the district court (Pet. App. 27a-46a) is reported at 12 F. Supp. 2d 921.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1998. A petition for rehearing was denied on February 11, 1999 (Pet. App. 7a-8a). The petition for a writ of certiorari was filed on May 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a constitutional challenge brought by the State of Wisconsin to the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. 2721-2725 (1994 & Supp. III 1997), which restricts disclosure of personal information from state motor vehicle records.[1] An individual who seeks a driver's license from his State's department of motor vehicles (DMV) is generally required to give the state DMV a range of personal information, including his name, address, telephone number, and in some cases medical information that may bear on the driver's ability to operate a motor vehicle. In some States, the motor vehicle department also requires a driver to provide his social security number (SSN) and takes a photograph of the driver. State DMVs, in turn, often sell this personal information to other individuals and businesses.[2] Although

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[1] The DPPA was enacted as part of an omnibus crime control law, the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. XXX, § 300002, 108 Stat. 2099. The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held hearings on the DPPA on February 3 and 4, 1994. Those hearings were never printed, and we are informed by the Clerk of the Judiciary Committee that the Committee no longer has documents or transcripts relating to the DPPA hearings. The principal prepared submissions to the Subcommittee are available on WESTLAW. See *Protecting Driver Privacy: Hearings on H.R. 3365 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 2d Sess., *available at* 1994 WL 212813, 212822, 212833, 212834, 212835, 212836, 212696, 212698, 212701, 212712, 212720 (Feb. 3-4, 1994).

[2] Representative Moran, a sponsor of the DPPA, observed: "Currently, in 34 States across the country anyone can walk into a DMV office with your tag number, pay a small fee, and get your name, address, phone number and other personal information—no

DMVs generally charge only a small fee for each particular sale of information, aggregate revenues are substantial. For example, New York's motor vehicle department earned $17 million in one year from individuals and businesses that used the State's computers to examine driver's license records. See 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

The personal information sold by DMVs is also used extensively to support the marketing efforts of corporations and database compilers. See 1994 WL 212836 (Feb. 3, 1994) (statement of Richard A. Barton, Direct Marketing Association) ("The names and addresses of vehicle owners, in combination with information about the vehicles they own, are absolutely essential to the marketing efforts of the nation's automotive industry."). This information "is combined with information from other sources and used to create lists for selective marketing use by businesses, charities, and political candidates." *Ibid.* See also 1994 WL 212834 (Feb. 3, 1994) (statement of Dr. Mary J. Culnan, Georgetown University) (describing use of DMV information by direct marketers).

The highly publicized 1989 murder of actress Rebecca Schaeffer brought to light the potential threat to privacy and safety posed by this commerce in motor vehicle record information. Schaeffer had taken pains to ensure that her address and phone number were not

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questions asked." 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994) (statement of Rep. Moran); see also 139 Cong. Rec. 29,466 (1993) (statement of Sen. Boxer); *id.* at 29,468 (statement of Sen. Warner); *id.* at 29,469 (statement of Sen. Robb); 1994 WL 212834 (Feb. 3, 1994) (statement of Dr. Mary J. Culnan, Georgetown University); 1994 WL 212813 (Feb. 3, 1994) (statement of Janlori Goldman, American Civil Liberties Union).

publicly listed. Despite those precautions, a stalker was able to track her down by obtaining her home address through her state motor vehicle records. See 140 Cong. Rec. H2522 (daily ed. Apr. 20, 1994) (statement of Rep. Moran). Evidence gathered by Congress revealed that that incident was similar to many other crimes in which stalkers, robbers, and assailants had used state motor vehicle records to locate, threaten, and harm victims.[3]

Moreover, Congress received evidence indicating that a national solution was warranted to address the problem of potentially dangerous disclosures of personal information in motor vehicle records. Marshall Rickert, Motor Vehicle Administrator for the State of Maryland, who testified in support of the legislation on behalf of the American Association of Motor Vehicle Administrators, emphasized that technological advances had dramatically increased the accessibility of state motor vehicle records, but that "many state laws have not kept pace with technological advancements, and permit virtually unlimited public access to driver and motor vehicle records." 1994 WL 212696 (Feb. 4, 1994). Accordingly, he urged that "uniform national standards are needed." *Ibid.* In addition, among the incidents brought to Congress's attention were ones in which stalkers had followed their victims across state lines. See 1994 WL 212822 (Feb. 3, 1994) (statement of David Beatty).

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[3] See, *e.g.*, 1994 WL 212698 (Feb. 4, 1994) (statement of Rep. Moran); 1994 WL 212822 (Feb. 3, 1994) (statement of David Beatty, National Victim Center); 1994 WL 212833 (Feb. 3, 1994) (statement of Donald L. Cahill, Fraternal Order of Police); 139 Cong. Rec. 29,469 (1993) (statement of Sen. Robb); *id.* at 29,470 (statement of Sen. Harkin).

2. Based on evidence about threats to individuals' privacy and safety from misuse of personal information in state motor vehicle records, Congress enacted the DPPA to restrict the disclosure of personal information in such records without the consent of the individual to whom the information pertains. The DPPA prohibits any state DMV, or officer or employee thereof, from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. 2721(a).[4] The DPPA defines "personal information" as any information "that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information," but not including "information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. 2725(3).

The DPPA bars only nonconsensual disclosures. Thus, DMVs may release personal information for any use, if they provide individuals with an opportunity to opt out from disclosure when they receive or renew their licenses. See 18 U.S.C. 2721(b)(11). In addition, a DMV may release personal information about an individual to a requester if the DMV obtains consent to the disclosure from the individual to whom the information pertains. See 18 U.S.C. 2721(d). A DMV also may disclose information about an individual if the

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[4] A "motor vehicle record" is defined as "any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles." 18 U.S.C. 2725(1).

requester has that individual's written consent. 18 U.S.C. 2721(b)(13).

The DPPA explicitly disclaims any restriction on the use of motor vehicle information by "any government agency," including a court, and also "any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. 2721(b)(1). It also expressly permits DMVs to disclose personal information for any state-authorized purpose relating to the operation of a motor vehicle or public safety. 18 U.S.C. 2721(b)(14).

The DPPA does not preclude States from disclosing personal information for other uses in which Congress found an important public interest. Thus, States may disclose personal information in their motor vehicle records for use in connection with car safety or theft, driver safety, and other motor vehicle related matters, 18 U.S.C. 2721(b)(2); by a business to verify the accuracy of personal information submitted to that business, and further to prevent fraud or to pursue legal remedies if the information the individual submitted to the business is revealed to have been inaccurate, 18 U.S.C. 2721(b)(3); in connection with court, agency, or self-regulatory body proceedings, 18 U.S.C. 2721(b)(4); for research purposes, if the personal information is not further disclosed or used to contact the individuals, 18 U.S.C. 2721(b)(5); by insurers in connection with claims investigations, anti-fraud activities, rating, or underwriting, 18 U.S.C. 2721(b)(6); to notify owners of towed or impounded vehicles, 18 U.S.C. 2721(b)(7); by licensed private investigative agencies or security services for permitted purposes, 18 U.S.C. 2721(b)(8); by employers to verify information relating to a holder of a commercial driver's license, 18 U.S.C. 2721(b)(9) (1994 & Supp. III 1997); for use in connection with

private tollways, 18 U.S.C. 2721(b)(10); and in certain circumstances for bulk distribution for surveys, marketing, or solicitation, if individuals are provided an opportunity, "in a clear and conspicuous manner," to prohibit such use of information pertaining to them, 18 U.S.C. 2721(b)(12)(a).

The DPPA also regulates, as a matter of federal law, the resale and redisclosure of personal information obtained from state DMVs, 18 U.S.C. 2721(c) (1994 & Supp. III 1997), and prohibits any person from knowingly obtaining or disclosing any record for a use not permitted by the DPPA, 18 U.S.C. 2722(a), or providing false information to a state agency to circumvent the DPPA's restrictions on disclosure, 18 U.S.C. 2722(b). The DPPA sets forth penalties and civil remedies for knowing violations of the Act. Any "person" (defined to exclude any State or state agency) who knowingly violates the DPPA may be subject to a criminal fine. 18 U.S.C. 2723(a), 2725(2). A state agency that maintains "a policy or practice of substantial noncompliance" with the DPPA may be subject to a civil penalty imposed by the Attorney General of not more than $5000 per day for each day of substantial noncompliance. 18 U.S.C. 2723(b). Any person who knowingly obtains, discloses, or uses information from a state motor vehicle record for a use not permitted by the DPPA may also be subject to liability in a civil action brought by the person to whom the information pertains. 18 U.S.C. 2724(a). The States, however, have no obligation themselves to regulate the use of information obtained under the Act or to pursue legal remedies against any requester who obtains or uses information in violation of the Act.

3. The State of Wisconsin receives approximately $8 million each year in revenue from the sale of motor

vehicle records. Pet. App. 30a. Petitioners, an agency and officer of the State of Wisconsin, intervened in a suit brought by other plaintiffs in district court, alleging that the DPPA exceeds Congress's constitutional powers, and seeking an injunction against enforcement of the DPPA. *Id.* at 10a-11a. The district court agreed with petitioners that the DPPA contravenes the Tenth Amendment. *Id.* at 35a-46a. The district court ruled that this case is controlled by *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997), because, it reasoned, the DPPA "forces state officials to administer and enforce a federally enacted regulatory program in violation of the Tenth Amendment." Pet. App. 40a. The court rejected (*id.* at 41a) the government's "distinction between: 1) positive and negative injunctions, * * * and 2) Congressional enactments that require states to regulate third parties and those that apply to the states directly and are an effort to resolve state-created problems." The court also rejected the government's reliance on *South Carolina* v. *Baker*, 485 U.S. 505 (1988), which upheld a federal law effectively requiring States to issue registered bonds rather than bearer bonds, because, it concluded, that case involved "the incidental application to the States of a federal law of general applicability." Pet. App. 43a. By contrast, the DPPA "is not a law of general applicability"; "[o]nly states collect driver's license and motor vehicle information and, if they so choose, disseminate it." *Id.* at 43a-44a.

4. The court of appeals reversed. Pet. App. 9a-24a. The court first rejected (*id.* at 14a) the argument that the DPPA "has the same vice as the statutes condemned in *Printz* and *New York*." The court recognized (*ibid.*) that the States may have to adopt new

rules and take certain actions in order to comply with the DPPA, but, it observed, "if this is the same thing as the situation in *Printz* and *New York*, then the application of the Fair Labor Standards Act to the states [upheld in *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)] likewise is unconstitutional, for the FLSA requires states to establish record-keeping systems and to establish mechanisms for paying employees according to a national formula." The court explained that "the basic distinction between cases such as *South Carolina* and cases such as *New York* is that states and private parties may be the *objects* of regulation, although states cannot be compelled to become regulators of private conduct." Pet. App. 14a.

The court next addressed the reasoning of the panel majority in *Condon* v. *Reno*, 155 F.3d 453 (4th Cir. 1998), cert. granted, No. 98-1464 (May 17, 1999). The court rejected the *Condon* panel's conclusion that Congress may regulate the States only through statutes of "general applicability," applicable to private parties as well as state and local governments. See Pet. App. 17a-20a. The court remarked that, if Congress were constitutionally required to address the problems of personal information held in both private and governmental databases in a single statute, the statute "would rival the Internal Revenue Code for complexity without offering states any real defense from the cost and inconvenience of regulation," and stressed that "Brobdignagian legislation is not the Constitution's objective, even when consolidation is feasible." *Id.* at 20a. Although the court suggested that "a law placing states at a disadvantage relative to similarly-situated private entities would be unconstitutional," *id.* at 18a, it noted

that petitioners had disavowed any such argument. *Id.* at 20a. The court thus upheld the Act.[5]

DISCUSSION

The question presented in this case is the same as the question presented in *Reno* v. *Condon*, cert. granted, No. 98-1464 (May 17, 1999). Accordingly, the petition in this case should be held pending the decision in *Condon*, and then disposed of as appropriate in light of the decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Reno* v. *Condon*, cert. granted, No. 98-1464 (May 17, 1999), and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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[5] The court also suggested that the DPPA would survive constitutional scrutiny even if it were analyzed under the framework set out in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), overruled by *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). "[Petitioners'] position would be doubtful even if *National League of Cities* were resurrected. The [DPPA] affects the states as operators of databases, not as sovereigns, and does not interfere with the achievement of any essential state function or discriminate against the states." Pet. App. 24a; see also *id.* at 12a (similar).